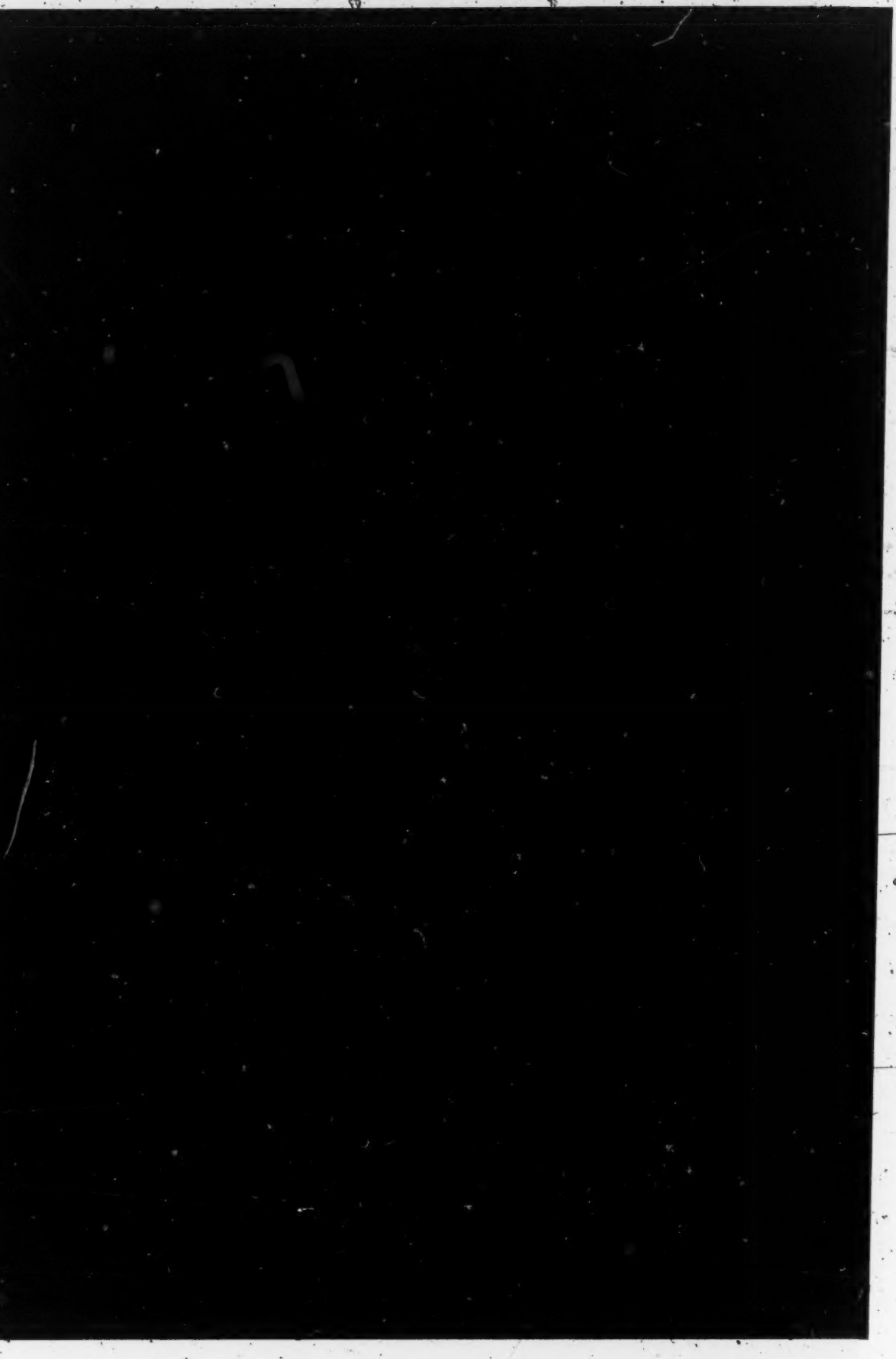


INDEX

	Page
Motion to Dismiss	1
No Appealable Question Presented	2
Statement of The Case	2
Argument	4
Conclusion	8
Appendix A	1a
Appendix B	2a
Appendix C	4a
Appendix D	5a

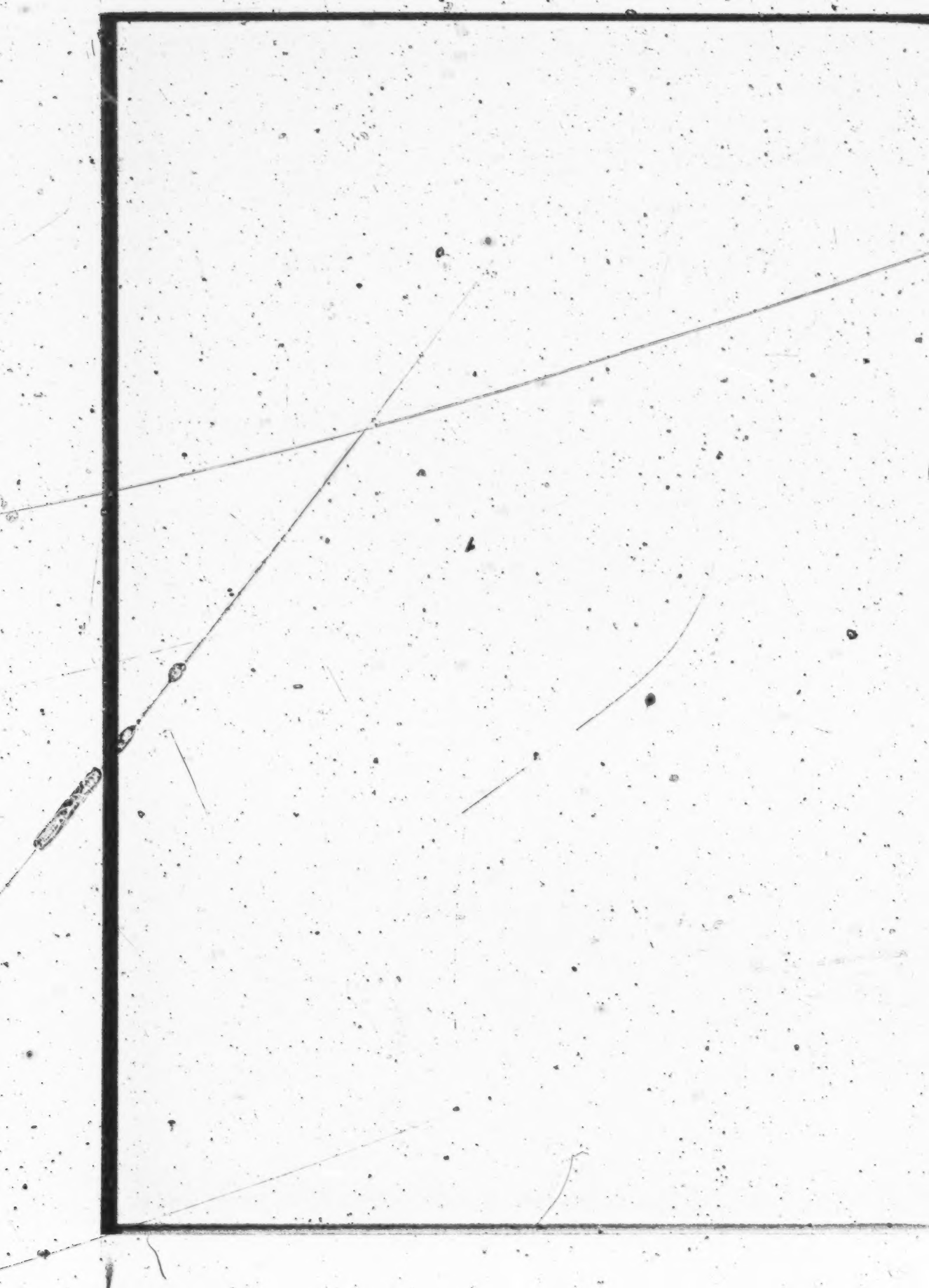
CITATIONS

CASES:

Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 378-379 (1965)	4
Point Transfer, Inc., Extension—Pa. and Ohio Origins, 105 M.C.C. 634	7

STATUTES:

Interstate Commerce Act, Section 207	2
28 U.S.C. 210(b)	2, 4



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 694

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

DIXIE HIGHWAY EXPRESS, INC., ET AL., *Appellees*.

No. 707

BRASWELL MOTOR FREIGHT LINES, INC., *Appellant*,

v.

DIXIE HIGHWAY EXPRESS, INC., ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Mississippi

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MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of this Court (adopted June 12, 1967, effective October 2, 1967), appellees move that this Court dismiss these appeals on the ground that they are not within the jurisdiction of

this Court because not taken within the time allowed. The names of the parties to this motion to dismiss are shown in Appendix A hereto.

NO APPEALABLE QUESTION PRESENTED

Appellants urge that these appeals only present a question as to the standard to be applied by the Interstate Commerce Commission in determining whether or not a Certificate of Public Convenience and Necessity should be issued pursuant to Section 207 of the Interstate Commerce Act. But such question cannot properly be presented, inasmuch as the only question resolved by the Court below was whether or not the Commission had complied with the original mandate of the Court. None of the appellants raise the only issue resolved by the Court below in its decision on plaintiffs' motion to enforce the original judgment, the appeals being nothing more than an attempt to assail that original judgment. The appeals are clearly foreclosed[1] and should be dismissed.

STATEMENT OF THE CASE

A clear statement of the sequence of events that brings the case to its present posture will demonstrate that these appeals must be dismissed, the time for taking them having expired some two years ago. Such a statement is not to be found in the jurisdictional statements of the appellants, appellant Braswell having simply adopted the jurisdictional statement of appellants Interstate Commerce Commission and United States of America, and those appellants having presented the matter as a routine appeal from a decision of a three judge court reviewing a decision of the Com-

[1] 28 U.S.C. 2101(b) and Rule 11 of the Rules of this Court.

mission on the merits. In point of fact, the decision below in sustaining the motion to enforce, did no more than restate the original judgment.

On July 19, 1965, the district court entered its final judgment (J.S. 229a-230a) setting aside the report and order of the Interstate Commerce Commission which granted to Braswell Motor Freight Lines, Inc., a Certificate of Public Convenience and Necessity. The grounds stated by the district court included *inter alia* inadequate findings on the part of the Commission and lack of substantial record evidence to support the Commission's conclusion. No appeal from that decision was taken by either the Interstate Commerce Commission, the United States, or Braswell Motor Freight Lines, Inc. Furthermore, no party sought rehearing before the district court, although Braswell did request the court to modify its judgment to remove the finding of lack of substantial evidence to support the Commission's conclusion. That request was denied by the court. (See Appendices B and C hereto).

Following the remand of the district court in July of 1965 the Commission reopened the Braswell application for reconsideration on the same record and subsequently, without having taken any additional evidence, issued its decision of January 17, 1966, (J.S. 8a-217a) again granting the Braswell application. Plaintiffs in the court below, which included the appellees here, did not bring an action seeking judicial review of the second Commission decision on its merits. Rather, they filed a motion requesting the district court to enforce its judgment of July 19, 1965, on the ground that the action of the Commission was inconsistent therewith. (See Appendix D hereto).. Defendants below, appellants here, resisted that motion and argued

that the Commission's action was not inconsistent with the court's mandate. The court unanimously held that the Commission's action was inconsistent, granted plaintiffs' motion to enforce, enjoined the Commission from granting the Braswell application on the basis of the Commission's January 1966 decision, and specifically reserved full jurisdiction to enforce its decree. (J.S. 6a-7a).

ARGUMENT

The judgment of the district court entered in July 1965 was clearly a final judgment in that it resolved the litigation. Indeed, the Commission so treated it for it purported to act pursuant to the court's remand. However, the Commission's second report and order is nothing more than a restatement of its prior determination, and the per curiam opinion issued by the district court along with its decree granting the motion to enforce merely points out the inconsistencies of the Commission's action with the court's final judgment and remand. The Commission did no more by its second decision than to restate the position taken in its first decision and the lower court did no more than reiterate its former objections. Consequently the sixty days allowed by law[2] for appealing the final decision of the three judge court ran from the entry of the court's judgment in July of 1965. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-379 (1965).

The Commission, in its first report, reversed the decision of the joint board and held that the application should be granted. It concluded (J.S. 243a) existing services were inadequate. It rationalized there has

[2] 28 U.S.C. 2101(b).

been growth in the Southeast and Southwest, asserted that appellees had failed to keep pace despite the services of appellees Roadway and Mercury which were so new shippers had not had sufficient time even to *test* them, and alleged that a large percentage of shipments require three or four interchanges en route.

In its decision (J.S. 218a-228a) the district court did not, as urged by appellants, (J.S. 4), merely enjoin the Commission on the ground of inadequate findings. Nor did it remand merely for more specificity.[3] This is made clear by the court's ultimate conclusion (J.S. 228a).

> "It is the view of this Court without prolonging this opinion that the report and order of the Interstate Commerce Commission thereon is not supported by the record *and* does not measure up to indicated standards and that such report and order should be vacated and annulled. * * *" (Emphasis ours)

The conclusion respecting lack of evidentiary support is firmly based upon findings and subsidiary conclusions, some of which follow:

> "* * * The Commission further stated: 'As a group, protestant motor carriers have been expanding their equipment and facilities and have been improving their services. However, a large percentage of shipments moving between points in the *considered territories* still require three of (sic) four interchanges en route.' *There does not appear to be any substantial support in this record for that statement,* and counsel for defendants at the bar were unable to point out any to this Court

[3] Underlying appellants' theory of the case is their assertion (J.S. 4) that the only requirement made by the court was that the Commission restate findings with "more than ordinary specificity".

in the record." (J.S. 222a) (Second emphasis added)

* * * *

"* * * Such findings and conclusions by the Interstate Commerce Commission are lacking in this case and it is apparent to this Court that its conclusions are *without substantial support in this record;* otherwise, it would have been more clearly and specifically stated in its record. * * *" (J.S. 225a) (Emphasis supplied)

* * * *

"In this case *there appears no substantial evidence* to support the conclusion that any actual transportation need or necessity existed for the granting of this franchise. * * *" (J.S. 226a) (Emphasis added)

* * * *

"This report of the Commission stands alone *without record support* of any idea that there were *any inadequacies in existing service.* * * *" (J.S. 227a) (Emphasis supplied)

The district court further held that there is no evidence that existing carriers were afforded an opportunity to rectify any claimed deficiencies in their services, contrary to the Commission's long-standing policy reaffirmed just a few days prior to oral argument. The court said (J.S. 227a):

"There is no evidence in this record that existing carriers were afforded *an opportunity to rectify any such deficiencies in their services.* Yet on April 23, 1965, the Interstate Commerce Commission said: 'We have *repeatedly stated* that existing carriers normally should be accorded an opportunity to transport all of the traffic they can handle in an adequate and efficient manner without the added competition of a new operation.' * * *" (Emphasis added)

The court concluded that refusal to give appellees' operations, especially the brand-new services of Roadway and Mercury, the same consideration consistently given others under similar circumstances was arbitrary "for to adopt different standards for similar situations is to act arbitrarily". That is one of the indicated standards the order was found not to measure up to.

The court further held (J.S. 227a), "One of the basic ingredients in the determination of public necessity is the inadequacy of existing service." In the face of the lower court's unappealed finding that there was no record support of any idea of inadequacies in existing service, and in the face of the court's refusal to modify that finding, the Commission, on the same record, by its second report and order again granted the certificate exclusively on the ground of inadequacy. This is conceded. (J.S. 5-10).

And, although the jurisdictional statement endeavors to find in the language of the court below in enforcing its decision an important question of broad public policy, the Commission clearly regards the decision as valid, for on October 3, 1967, long after it gave notice of appeal herein, the Commission relied heavily upon the court's decision to support its denial of 32 applications seeking to transport iron and steel articles between points in eastern Ohio and western Pennsylvania and points in numerous states. In that case, *Point Transfer, Inc., Extension—Pa. and Ohio Origins,* 105 M.C.C. 634, the Commission stated on page 659:

> "We are convinced that the applications cannot be granted. The Commission has stated repeatedly that existing carriers normally should be afforded an opportunity to transport all the traffic they can handle in an adequate and efficient manner with-

> out added competition of a new operation. One of the basic elements in the determination of public need is the inadequacy of existing service. *Dixie Highway Express, Inc.* v. *United States,* 242 F. Supp. 1016 (1965) * * *."

The district court, in enforcing its judgment, held (J.S. 2a) that the Commission's restatement of its reasons with more than ordinary specificity rectified "only part of the infirmity pointed out". In the same clear and unambiguous words, employed in its decision, the court reiterated, *inter alia* (J.S. 227a; 2a) that a basic ingredient in the determination of public convenience and necessity is inadequacy, that the Commission has uniformly held that existing carriers should be accorded an opportunity to transport all the traffic they can handle in an adequate and efficient manner without added competition, that there is no evidence that existing carriers were afforded an opportunity "to rectify" any claimed deficiencies in their services, and that it was arbitrary for the Commission to apply different standards to these appellees under similar circumstances than uniformly applied to others.

CONCLUSION

The court did no more in enforcing its judgment than to restate what it had decided the first time. Indeed, the very question said to be here presented (J.S. 3) is based upon a conclusion in the second opinion which reiterated the conclusion of the first in identical words. If appellants believed the court erred, they had every opportunity and should have appealed the original judgment. They cannot appeal the second. Where, as here, a court sets aside an agency order and the agency merely restates its position and the court merely

reiterates former objections, time for appeal runs from the court's first judgment.

In *Colgate-Palmolive, supra*, this Court said at page 378:

> "* * * The Commission may not merely restate its former position in a new order and then apply for certiorari when the court of appeals reiterates its previous objection. As was said in *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17,20f, 'If the court did no more by the second judgment than to restate what it had decided by the first one . . . the 90 days would start to run from the first judgment.' To the same effect see *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211. * * *"

Clearly, the time for taking these appeals has long since expired and they should be dismissed for lack of jurisdiction. Appellees respectfully so move.

Respectfully submitted,

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